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Honorable Christopher M. Alston
Chapter 11
Hearing Location: Rm. 7206
Hearing Date: September 8, 2016
Hearing Time: 1:30 p.m.
Response Date: September 1, 2016

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7 UNITED STATES BANKRUPTCY COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 In re:

Case No. 16-11767-CMA

11 NORTHWEST TERRITORIAL MINT LLC,
12 Debtor.

13
14 DAVID T. ACHORD, an individual,
15 Plaintiff,

Adv. Proc. No. 16-01167-CMA

16 v.

**TRUSTEE'S MOTION TO
DISMISS COMPLAINT WITH
PREJUDICE**

17 NORTHWEST TERRITORIAL MINT LLC
18 Defendant.
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21 **I. INTRODUCTION**

22 Defendant Mark Calvert, the Chapter 11 Trustee for Defendant Northwest Territorial Mint
23 LLC (the "Trustee") respectfully requests, pursuant to Fed. R. Civ. P. 12(b)(6), that the Court
24 dismiss with prejudice the Plaintiff's Complaint because it fails to state a claim upon which relief
25 can be granted. Plaintiff's Complaint seeks a determination that an alleged debt owed by the Debtor
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1 to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2) and (a)(6). As a matter of law,
2 section 523(a) of the Bankruptcy Code applies to individual debtors, and not corporate debtors such
3 as Northwest Territorial Mint, LLC. Thus, even accepting all of the Plaintiff's allegations in his
4 Complaint as true, Plaintiff fails to state a claim upon which relief can be granted. As set forth
5 herein, Plaintiff's Complaint should be dismissed with prejudice.

6 **II. BACKGROUND**

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8 On April 1, 2016, Northwest Territorial Mint, LLC (the "Debtor" or "NWTM"), a
9 Washington limited liability company, commenced this case by filing a chapter 11 petition. Dkt.
10 No. 1. On April 11, 2016, the Court appointed Mark Calvert as chapter 11 trustee over the Debtor.
11 Dkt. No. 51. On July 11, 2016, David T. Achord filed his Complaint for Determination of
12 Dischargeability and Objecting to Debtor's Discharge Pursuant to Sections 523 and 1141 of the
13 Bankruptcy Code (Ad. Pro. Dkt. No. 1) (the "Complaint").¹

14 The Complaint alleges that the Plaintiff ordered 200 1 oz. silver bars from the Debtor on or
15 about October 28, 2015, and that Plaintiff paid \$3,304 for the precious metals by a check that was
16 received and posted by the Debtor on or about November 2, 2015. Complaint, ¶ 12. According to the
17 Plaintiff, he made four additional purchases of silver, by check, on the following dates: October 29,
18 2015, November 1, 2015, November 4, 2015, and November 6, 2015. Complaint, ¶¶ 13-16. The
19 Plaintiff further alleges that the Debtor, on separate occasions, promised via email that the purchases
20 of silver would be shipped between January 18, 2016 and January 29, 2016. *Id.* According to the
21 Complaint, the Plaintiff has ordered a total of 2,210 ounces of silver from the Debtor and has paid a
22 total of \$30,192.40. Complaint, ¶ 20. Plaintiff states that Debtor has failed to fulfill any of Plaintiff's
23 purchase orders, despite his repeated prepetition demands that the Debtor do so. *Id.*

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25 ¹ Although Mr. Achord is proceeding in this matter *pro se*, his email indicates that he works for a law firm
26 specializing in personal injury complaints. The website for the State Bar of California indicates that Plaintiff's
full name is David Thaddeus Achord, and that he is an active member of the California State Bar who was
admitted to practice law in May of 1999.

1 The Complaint contains two counts. In Count I of the Complaint, Plaintiff alleges that the
2 alleged debt owed by the Debtor to Plaintiff is nondischargeable pursuant to 11 U.S.C. §
3 523(a)(2)(A). The Plaintiff alleges that the Debtor represented that, among other things, it would
4 fulfill and deliver Plaintiff's orders, and that such representations were "fraudulent and made under
5 false pretenses" because the Debtor "never intended to continue operating its business or fulfill
6 plaintiff's orders." Complaint, ¶¶ 24-25. In Count II of the Complaint, the Plaintiff alleges that
7 under 11 U.S.C. § 523(a)(6), the Debtor's alleged debt to Plaintiff is nondischargeable because it is
8 the result of "willful and malicious injury." Complaint, ¶¶ 32-33.

9 In the Plaintiff's prayer for relief, the Plaintiff requests that the Court (1) enter a judgment
10 determining that the Debtor's debt to Plaintiff is nondischargeable; (2) order that the Debtor deliver
11 Plaintiff 2,210 ounces of 999 fine silver; (3) grant the Plaintiff the market value of 2,210 ounces of
12 999 fine silver; (4) award treble damages; (5) award exemplary or punitive damages; (6) award
13 discretionary costs and attorney fees in Plaintiff's favor; (7) order that the costs of the clerk be taxed
14 against the Debtor; and (8) award Plaintiff such other relief the Court deems just and proper.

15 The Plaintiff has filed a proof of claim, Claim No. 2362-1, in which he states that his claim is
16 an unsecured claim for goods sold.

17 **III. ARGUMENT**

18 The Plaintiff's Complaint, in order to survive a 12(b)(6) motion to dismiss, must allege
19 "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*,
20 550 U.S. 544, 570 (2007). Plaintiff must establish "the plausibility, as opposed to conceivability, of
21 its causes of action in the complaint." *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond*
22 *Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 303 (3d Cir. 2012). The Complaint must contain
23 "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action
24 will not do." *Twombly*, 550 U.S. at 555. Where there are "well-pleaded factual allegations, a court
25 should assume their veracity and then determine whether they plausibly give rise to an entitlement to
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1 relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Matters subject to the Court’s judicial notice,
2 including court records, may also be considered by the Court in deciding a motion to dismiss
3 pursuant to Fed. R. Civ. Pro. 12(b)(6). *In re Colonial Mortg. Bankers Corp.*, 324 F.3d at 16, 19; *see*
4 *also United States v. Mercado*, 412 F.3d 243, 247 (1st Cir. 2005) (United States Court of Appeals for
5 the First Circuit concluded that it could take judicial notice of relevant state court records in criminal
6 proceeding).

7 **A. Plaintiff’s Complaint for Nondischargeability Fails as a Matter of Law Because the**
8 **Debtor is a Corporate Debtor and Not an Individual.**

9 The Plaintiff alleges causes of action under section 523(a) of the Bankruptcy Code, seeking
10 a determination that the alleged debt owed by the Debtor to the Plaintiff is nondischargeable in
11 bankruptcy. As a matter of law, section 523(a) of the Bankruptcy Code does not apply in this case
12 because the Debtor is not an “individual.” Section 523(a), by its own terms, provides that a discharge
13 under section 1141 does not discharge an *individual* debtor for certain types of debts, including the
14 types alleged by the Plaintiff.² Because this case involves a corporate debtor, as opposed to an
15 individual debtor, section 523(a) does not apply. *See e.g., In re Pacific-Atlantic Trading Co.*, 64 F.3d
16 1292, 1302 (9th Cir. 1995) (stating that “§ 523 only applies to individual and not corporate
17 debtors”); *Yamaha Motor Corp. U.S.A. v. Shadco, Inc.*, 762 F.2d 668, 670 (8th Cir. 1985)
18 (“Congress clearly did not intend the term ‘corporate debtor’ to be used interchangeably with the
19 term ‘individual debtor,’ as such a construction would render meaningless employment by Congress
20 of the term ‘individual.’”); *In re Push & Pull Enterprises, Inc.*, 84 B.R. 546 (N.D. Ind. 1988)
21 (granting debtor’s motion to dismiss nondischargeability complaint on basis that provisions of 523
22 could not apply to the corporate debtor).

23 Were the Court to grant the relief requested in the Plaintiff’s Complaint, it would interfere
24 and be inconsistent with the terms of a chapter 11 plan the Trustee will file in this case and would

25 ² 11 U.S.C. § 523(a) states that “[a] discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b)
26 of this title does not discharge *an individual debtor* from any debt-- . . .” (emphasis added).

1 elevate the Plaintiff's right of recovery over the many other creditors who hold claims similar to that
2 of the Plaintiff. There are thousands of creditors in this case who have, just like the Plaintiff, ordered
3 precious metals that the Debtor failed to deliver prior to the petition date. All such claims are
4 unsecured claims subject to treatment under a plan. Plaintiff's claim will be administered by the
5 Trustee in this case along with other similarly situated claims. There is no legal basis for Mr. Achord
6 to receive preferential treatment with respect to his claim.

7 **B. Plaintiff's Action Should be Dismissed Without Leave to Amend.**

8 The Complaint should be dismissed with prejudice. Each cause of action in the Complaint,
9 and all of Plaintiff's requests for relief, are premised on Plaintiff's legal theory that his claim is
10 nondischargeable pursuant to 11 U.S.C. § 523(a). That statute, however, describes the circumstances
11 under which debts of an *individual* debtor are nondischargeable. It does not apply to corporate
12 debtors. Plaintiff cannot cure this deficiency by alleging additional facts in the Complaint. Thus,
13 because Plaintiff cannot allege any facts that would entitle it to the relief requested, the Court should
14 not grant Plaintiff further leave to amend, but should instead dismiss this action in its entirety. *See*
15 *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (stating
16 that dismissal with prejudice may be warranted where the "allegation of other facts consistent with
17 the challenged pleading could not possibly cure the deficiency").

18 **C. The Plaintiff Has Failed to Effect Service of the Complaint.**

19 Out of an abundance of caution, the Trustee submits that should the Court, for any reason,
20 not dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), the Plaintiff's Complaint should be
21 dismissed pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process. On July 13, 2016,
22 the Clerk of the Court issued the summons in this matter (the "Summons"). *See* Dkt. No. 2. The
23 Summons provides that it must be served within 7 days of its issuance, and that a certificate of
24 service must be filed by the Plaintiff within 14 days after service has been effected. No proof of
25 service has been filed by the Plaintiff, and the Trustee's records do not reflect that Northwest
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1 Territorial Mint, LLC has been served with a copy of the Complaint and Summons pursuant to the
2 requirements of Fed. R. Bankr. P. 7004.

3 **IV. CONCLUSION**

4 The Trustee respectfully requests that this Court dismiss this matter against the Debtor with
5 prejudice. The Trustee believes that the Complaint has no legitimate legal basis.³ The Trustee
6 therefore reserves the right to move for sanctions pursuant to Fed. R. Bankr. P. 7011 upon dismissal
7 of the Plaintiff's claims.

8 DATED this 11th day of August, 2016.

9 K&L GATES LLP

10 By /s/ Michael J. Gearin

11 Michael J. Gearin, WSBA #20982

12 David C. Neu, WSBA #33143

13 Brian T. Peterson, WSBA #42088

14 Attorneys for Mark Calvert, Chapter 11 Trustee

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25 ³ Prior to filing this Motion, Trustee's counsel provided written notice to Plaintiff of the lack of legal
26 basis for his claims and requested that he withdraw his Complaint. Plaintiff has insisted on pursuing
this litigation.

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That she is a paralegal in the law firm of K&L Gates LLP, and on August 11, 2016, she caused the foregoing document to be filed electronically through the CM/ECF system which caused Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing and on the Plaintiff as indicated below:

Plaintiff

- ☐ via facsimile
☐ via overnight courier
☒ via first-class U.S. mail
☐ via email
☐ via electronic court filing
☐ via hand delivery

Executed on the 11th day of August, 2016 at Seattle, Washington.

/s/ Denise A. Evans
Denise A. Evans